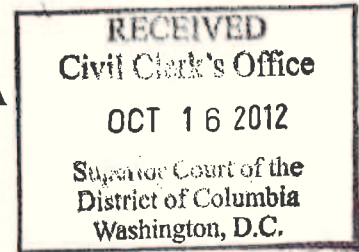


IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION



D.C. OPEN GOVERNMENT COALITION,
P.O. Box 73771
Washington, D.C. 20056

Plaintiff,

v.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Defendant.

Case No.: **0008118-12**

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff D.C. Open Government Coalition, by its undersigned attorney, alleges for its Complaint:

1. This is an action under the D.C. Freedom of Information Act, D.C. Code § 2-531 *et seq.* ("FOIA," "the Act"), to order the production of public records improperly withheld by the Council of the District of Columbia ("the Council") in response to a FOIA request made by the D.C. Open Government Coalition ("the Open Government Coalition" or "the Coalition").
2. The Open Government Coalition seeks to compel the Council to permit inspection and copying of the public records requested in the Coalition's FOIA request of March 19, 2012 – namely, any and all e-mails sent or received by Councilmembers by means of non-governmental e-mail accounts, during a defined, 60-day period, in the course of Councilmembers' transaction of public business – i.e., "in his or her role as a public official." The Coalition's request expressly excluded any e-mails that are personal or private in nature.

3. Despite acknowledging that the requested e-mails are likely public records by virtue of their subject matter, the Council has denied the Open Government Coalition's request for these records. The Council takes the position that Councilmember records of e-mail communications transacting public business are only within the control of the Council – and therefore only subject to FOIA – when sent or received through an official governmental e-mail account. The Open Government Coalition believes that position is incorrect, because such records are within at least the constructive control or possession of the Council and could be gathered and disclosed with the reasonably diligent search required by FOIA.

4. The District of Columbia is committed by statute to governmental openness, and a fundamental purpose of FOIA is to assist citizens in discovering what their government is doing. The Council's position that records of some public business may be hidden from view by Councilmembers is contrary to the legal requirements of FOIA, and also raises serious public policy concerns. Openness not only promotes accountability of the government to the governed, but it also serves as a powerful check on corruption. If the Council's constricted view of its legal obligations is permitted to stand unchecked by this Court, Councilmembers would have *carte blanche* to hide e-mail exchanges about official business from public disclosure under FOIA. Under this view, even a Councilmember working in a Council office or sitting at a government meeting could move official exchanges "off the books" simply by opting to use a non-governmental e-mail account on his or her computer or mobile device – a practice that, based on information and belief, is now commonplace. In effect, FOIA would be eviscerated as it pertains to the Council's e-mail records.

5. Indeed, the Council's constricted view of its legal obligations to produce public records under FOIA would mean that any public documents not physically located on Council

property – including, for example, official paper documents placed in a Councilmember’s briefcase, or taken out of a Council office by a Councilmember – would fall outside the ambit of FOIA, even if those documents remained within the control of a Councilmember.

JURISDICTION

6. This Court has jurisdiction over this action pursuant to D.C. Code § 2-537(a-1) (“Any person denied the right to inspect a public record in the possession of the Council may institute proceedings in the Superior Court for the District of Columbia for injunctive or declaratory relief, or for an order to enjoin the public body from withholding the record and to compel the production of the requested record.”). Because the Coalition’s FOIA request was made to the Council, no administrative appeal within the executive branch of the D.C. government is allowed, and any challenge to the Council’s denial is properly directed to the Superior Court. *Id.*

PARTIES

7. The Open Government Coalition is a non-profit organization dedicated to enhancing governmental transparency and freedom of information in the District of Columbia.

8. The Council is the central and chief policy-making body for the District of Columbia. The Council is subject to FOIA. D.C. Code §§ 2-532(a), 2-537(a-1). The Council’s denial of the Coalition’s FOIA request is the subject of this action.

FACTS

I.

Private E-mail Accounts Are Often Used to Conduct Public Business in the District of Columbia and Elsewhere

9. According to a December 7, 2011 *Washington Post* news article, District of Columbia Chief Financial Officer Natwar M. Gandhi and his chief of staff testified in civil litigation about their communications on personal e-mail accounts “for office purposes,”

including such exchanges with D.C. Councilmembers. In explaining this practice, the chief of staff reportedly testified: “There may have been an issue that we wanted to discuss, but did not necessarily want it to be FOIA-able to the press and, so we would have perhaps had a conversation on personal e-mail.”

10. This statement about using non-governmental e-mail accounts for the purpose of avoiding disclosure of official communications under FOIA is remarkable only for its candor. Councilmembers and others in the D.C. government have for years been reputed to use personal e-mail accounts to conduct government business. As the *Washington Post* noted in an editorial published the same day as the December 7, 2011 news article, “[o]bservers and insiders of D.C. government say the use of private e-mail is so widespread as to be essentially a shadow level of government,” and “some council staff and members admit to the practice.” Based on information and belief, one Councilmember in particular is known to use a “gmail” account almost exclusively for Council business. The Council has also disclosed a legal advisory opinion indicating that at least one Councilmember has used a “Hotmail” account to conduct public business.

11. Public servants in the District of Columbia are not alone in using private e-mail accounts to conduct official business now that technological advances have made such accounts readily available. In recent years attorneys general in various states – including Alaska, Florida, Illinois, Maryland and Wisconsin – have issued advisory opinions concluding that public records housed in the private e-mail accounts of public officials remain subject to open-records laws. State courts in New York, Pennsylvania, Washington, and elsewhere have reached the same conclusion in response to legal challenges to agency withholdings.

12. Faced with concerns about official business being hidden from public view, governors and other officials in various states have issued orders restricting use of non-governmental e-mail accounts for any official business.

13. On July 10, 2012, D.C. Mayor Vincent C. Gray issued Mayor's Order 2012-102, regarding "Use of Private Email to Transact Public Business." The order's stated purpose was to "[e]nsure that all emails sent or received by District employees in which those employees are transacting public business are captured on servers ... and available to Freedom of Information Act ('FOIA') requests as well as to investigative demands, litigation-related requests, and all other email search requests made by persons within and outside the District of Columbia government."

14. The Mayor's Order "strongly discourage[s]" use of any personal e-mail accounts to conduct public business, and permits use of those accounts only when an official e-mail account is inaccessible. Even in such situations, a government official must "cc" or "bcc" "the employee's District-provided e-mail account."

15. As an Executive Branch Order, the Mayor's Order does not on its face apply to the Council.

16. However, pursuant to the Rules of Organization and Procedures for the Council of the District of Columbia, Section 202 (Code of Official Conduct), "Councilmembers and Council staff shall take full responsibility for understanding and complying with the letter and spirit of all laws and regulations governing standards of conduct for District public officials, including those relating to ... freedom of information."

II.
**The D.C. Open Government Coalition Requested Public
Records Maintained in Councilmember E-mail Accounts**

17. Under FOIA, a “public record” includes all documents “prepared, owned, used in the possession of, or retained by a public body,” including the “Council of the District of Columbia.” D.C. Code §§ 2-502(18), (18A); *id.* § 2-539 (incorporating definitions).

18. Under FOIA, a “public record” expressly includes “information stored in an electronic format.” D.C. Code §§ 2-502(18), *id.* § 2-539 (incorporating definitions).

19. On March 19, 2012, the Open Government Coalition submitted the FOIA request that is the subject of this action (“the Request”). A copy of the Request is attached as Exhibit A.

20. The Request sought “[a]ny and all e-mails sent or received within the past sixty (60) days by current Councilmembers using private (non-governmental) e-mail accounts, but only to the extent that such e-mails were generated in the course of the Councilmember’s official duties – *i.e.*, were received or sent by the Councilmember in his or her role as a public official.”

21. The Open Government Coalition clarified that the Request “does not include e-mails sent or received on private accounts that are personal or private in nature. It merely seeks copies of e-mails that amount to transacting public business by means of private e-mail accounts within the past 60 days. The request pertains to each Councilmember.”

III.
**The D.C. Council Denied the Coalition’s Request,
Disclaiming Any Obligation Under FOIA to Disclose the
Public Records of Individual Councilmembers**

22. On March 27, 2012, the Council denied the Request (“the Denial”). A copy of the Denial is attached as Exhibit B.

23. The Denial asserted that “[t]he requested records are not among the public records of the Council of the District of Columbia.”

24. The Denial attached as an exhibit a three-page memorandum from the Office of the General Counsel, Council of the District of Columbia, to the Secretary of the Council, dated several months earlier, January 3, 2012, regarding “Freedom of Information Act and Councilmembers’ Personal Email Accounts” (“the Memorandum”).

25. The Memorandum addressed an inquiry about whether public records from a Councilmember’s “Hotmail” account were subject to disclosure under FOIA. The identity of the specific Councilmember was redacted. Although the Memorandum “presume[d]” that the requested records qualify as “‘public records’ within the meaning of the District’s FOIA,” the Memorandum concluded that “because the Council does not possess or control the records in question, the Council is under no legal obligation to produce them.”

26. Members of the Open Government Coalition, in an unsuccessful effort to resolve this dispute over the Request without litigation, exchanged correspondence with the Council (attached as Exhibit C) and then met with the Council’s General Counsel in August 2012. However, the Coalition understands the Council’s final position to be that it has no obligation under FOIA to search for or to produce e-mail communications by Councilmembers about public business if those Councilmembers use a non-governmental e-mail account to send or receive such messages.

COUNT 1

VIOLATION OF FOIA

27. The Open Government Coalition repeats, re-alleges, and incorporates the allegations in the foregoing paragraphs as though fully set forth herein.

28. The Council is subject to FOIA, D.C. Code §§ 2-532(a), 2-537(a-1), and must release in response to a FOIA request any disclosable public records in its control or possession

at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

29. The requested records are public records.

30. The requested records are within the Council's constructive control or possession because they are within the control or possession of Councilmembers.

31. The Council's refusal to search for or to disclose the requested public records violates FOIA.

32. The Open Government Coalition is entitled to an order compelling the Council to conduct a reasonably diligent search for documents in response to the Request, including public records maintained by Councilmembers in non-governmental e-mail accounts, and compelling the Council to disclose those records in response to the Request.

REQUESTED RELIEF

WHEREFORE, the Open Government Coalition respectfully requests that this Court:

- a. Declare that the documents sought by the Request are public records under D.C. Code § 2-531 *et seq.* and must be disclosed;
- b. Declare that the documents sought by the Request are within the control of the Council under D.C. Code § 2-531 *et seq.* and must be disclosed;
- c. Order the Council to conduct a search and to provide all responsive documents to the Open Government Coalition within 20 business days of the Court's order;
- d. Award the Open Government Coalition the costs of this proceeding, including reasonable attorney's fees, as expressly permitted by FOIA; and
- e. Grant the Open Government Coalition such other and further relief as this Court deems just and proper.

Dated: October 16, 2012

Respectfully submitted,



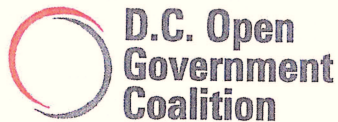
Chad R. Bowman (D.C. Bar No. 484150)
LEVINE SULLIVAN KOCH & SCHULZ, LLP
1899 L Street, N.W., Suite 200
Washington, D.C. 20036
(202) 508-1120
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Of counsel:

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Frederick V. Mulhauser
(D.C. Bar No. 455377)
fmulhauser@aol.com
D.C. Open Government Coalition
P.O. Box 73771
Washington, D.C. 20056

Counsel for Plaintiff
D.C. Open Government Coalition

EXHIBIT A



March 19, 2012

BY E-MAIL (nsmith@dccouncil.us) and MAIL

Ms. Nyasha Smith
FOIA Officer and Secretary to the Council
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 5
Washington, D.C. 20004

Re: D.C. Freedom of Information Act Request

Dear Ms. Smith:

The D.C. Open Government Coalition ("OGC") hereby submits a request under the Freedom of Information Act, D.C. Code Ann. §§ 2-531 et seq., to inspect and/or obtain copies of the following records:

Any and all e-mails sent or received within the past sixty (60) days by current Councilmembers using private (non-governmental) e-mail accounts, but only to the extent that such e-mails were generated in the course of the Councilmember's official duties – i.e., were received or sent by the Councilmember in his or her role as a public official.

This request therefore does not include e-mails sent or received on private accounts that are personal or private in nature. It merely seeks copies of emails that amount to transacting public business by means of private email accounts within the past 60 days. The request pertains to each Councilmember.¹

OGC is a non-profit organization dedicated to enhancing government transparency and freedom of information in the District of Columbia. We are pursuing this request in furtherance of the public's legitimate interest in knowing what was discussed by its elected Council representatives in a plenary session. Accordingly, the request qualifies for a fee waiver or

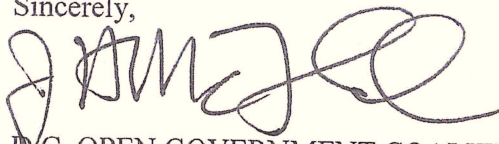
¹ The request is being directed to the Council rather than each individual member based on our understanding that Council itself (rather than an individual member or members) is the appropriate public body to receive a FOIA request, even if the responsive records pertain to particular members.

reduction pursuant to D.C. Code Ann. § 2-532(b). If such a fee waiver or reduction is not granted, however, OGC requests that it be notified if the expected fees exceed \$100.

Please direct any communications or correspondence regarding this FOIA request to me by email at jamesAmclaughlin@gmail.com (preferred) or by mail to my attention at 1602-C Belmont Street, NW, Washington, DC 20009. OGC requests that any responsive records be produced in electronic rather than paper form, if possible. I am available to discuss the request during business hours at (202) 334-7988.

Please do not hesitate to contact me with any questions. Thank you for your time and attention to this request.

Sincerely,

A handwritten signature in dark ink, appearing to read 'JAMC', followed by a large, stylized flourish or loop.

D.C. OPEN GOVERNMENT COALITION

By: James A. McLaughlin
Chair, Legal & Enforcement Committee

cc: David Zvenyach, Esq. (by email)

EXHIBIT B



James McLaughlin <jamesamclaughlin@gmail.com>

FOIA request from D.C. Open Government Coalition

Smith, Nyasha (Council) <NSmith@dccouncil.us>

Tue, Mar 27, 2012 at 4:37 PM

To: James McLaughlin <jamesamclaughlin@gmail.com>, "Zvenyach, Vladlen David (Council)" <vzvenyach@dccouncil.us>


Please find attached the Council's response to your request. I've also attached for your reference a legal opinion from our General Counsel about private emails.

Nyasha

From: Smith, Nyasha (Council)
Sent: Tuesday, March 20, 2012 4:07 PM
To: 'James McLaughlin'; Zvenyach, Vladlen David (Council)
Cc: Warren, Chris (Council)
Subject: RE: FOIA request from D.C. Open Government Coalition

[Quoted text hidden]

2 attachments

 **McLaughlin on private emails.pdf**
91K

 **20120103 NSmith re FOIA and private emails.pdf**
103K



**COUNCIL OF THE DISTRICT OF COLUMBIA
THE WILSON BUILDING**

Office of the Secretary

(202) 724-8080

(202) 347-3070 (Fax)

March 27, 2012

Mr. James A. McLaughlin
DC Open Government Coalition
Via email to jamesamclaughlin@gmail.com

Dear Mr. McLaughlin:

This letter is in response to your Freedom of Information Act request to the Council of the District of Columbia for the following documents:

"Any and all e-mails sent or received within the past sixty (60) days by current Councilmembers using private (non-governmental) e-mail accounts, but only to the extent that such e-mails were generated in the course of the Councilmember's official duties — i.e., were received or sent by the Councilmember in his or her role as a public official."

The requested records are not among the public records of the Council of the District of Columbia.

If you are dissatisfied with the determinations set forth in this letter, you may file a civil action in the Superior Court of the District of Columbia pursuant to D.C. Official Code § 2-537(a-1).

For your convenience, these records have been attached to the email response. Please don't hesitate to contact me at 202.724.8080 or nsmith@dccouncil.us if you have any questions or concerns about this matter.

Sincerely,

/s/ Nyasha Smith

Nyasha Smith
Secretary to the Council

OFFICE OF THE GENERAL COUNSEL
COUNCIL OF THE DISTRICT OF COLUMBIA

1350 Pennsylvania Avenue NW, Suite 4, Washington, DC 20004 • (202) 724-8026

MEMORANDUM

To: Nyasha Smith, Secretary
From: V. David Zvenyach, General Counsel
Date: January 3, 2012
Re: Freedom of Information Act and Councilmembers'
Personal Email Accounts

You requested an opinion about whether the Freedom of Information Act requires the Council to obtain and produce emails that generated on a personal email account and that are not in the possession or control of the Council. It is my opinion that the Act does not impose such a requirement.

I. BACKGROUND

On November 30, 2011, [REDACTED] counsel for [REDACTED] requested a formal legal opinion with respect to the use of personal email accounts by Councilmembers.¹ In particular, [REDACTED] noted that Councilmember [REDACTED] copied his personal "Hotmail" email account, but that the Council did not search that Hotmail account. [REDACTED] believes that the emails in the Hotmail account are "covered under the FOIA," but you have advised me that the Council does not possess the emails in the Hotmail account and that Councilmember [REDACTED] Hotmail account is not owned, managed, or accessible to the Council.

II. ANALYSIS

The District's Freedom of Information Act ("FOIA") entitles any person to inspect or copy "any public record of a public body."²

¹ The threshold question from [REDACTED] is whether the Council has a "policy on use of personal email accounts vis-à-vis government business." As a general matter, this is not a question of FOIA, but one of record-retention policies. The Council does not have such a policy, though it should consider adopting one in order to address this and related issues.

² D.C. Official Code § 2-532(a).

As a public body,³ the Council is required to allow for inspection or duplication of the Council's public records. For purposes of FOIA, "public record" is defined to include:

[A]ll books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body. Public records include information stored in an electronic format.⁴

As a threshold matter, I presume that the records requested makes them "public records" within the meaning of the District's FOIA.⁵ Even so, if the Council did not possess or control the public records at the time of the request, the Council is not required to produce them under FOIA.⁶

³ D.C. Official Code § 2-502(18A).

⁴ D.C. Official Code § 2-502(18).

⁵ Most jurisprudence involving emails and "public records" pertain to whether emails of a "personal" nature that are conducted on government accounts are considered "public records." *E.g., Media Research Center v. U.S. Dep't of Justice*, --- F. Supp. 2d ---, Nos. 10-2013, 11-0426, slip op. at 6 (Oct. 13, 2011) (holding that emails generated on government email accounts between then-Solicitor General Elena Kagan and the White House in her capacity as a judicial nominee were not "agency records" under FOIA because "Kagan's correspondence was not relied upon by the [Office of the Solicitor General] in carrying out its business, but rather was used for a purely personal objective."). [REDACTED] citation to *Bureau of National Affairs v. U.S. Department of Justice*, 742 F.2d 1484, 1490 (D.C.Cir.1984), bears on this line of cases, but it does not bear on whether public records must be produced if they are not in the possession or control of a public body.

⁶ I have consulted with the Office of the Attorney General, and the Office concurs with this view. *Accord, e.g., Freedom of Information Act Appeal*, No. 2011-58 (August 22, 2011) ("DC FOIA only requires production of records in the possession of an agency.").

Under the federal FOIA, upon which [REDACTED] correctly notes the District's FOIA is patterned, an agency cannot be compelled to produce a document that the agency did not possess at the time the request was made. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). Specifically, the Supreme Court has held that "possession or control is a prerequisite to FOIA disclosure" and that FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created *and* retained." *Kissinger v. Reporters Cmte. for Freedom of the Press*, 445 U.S. 136, 152 (1980) (emphasis added).

Similarly, the District's FOIA does not impose an obligation on an agency to create or retain records, nor does it impose an obligation to collect records. Instead, FOIA requires a public body that has possession or control of a public record to search its files for the public record, and disclose it. Here, because the Council does not possess or control the records in question, the Council is under no legal obligation to produce them.

If, however, the Council *does* maintain possession or control of a public record, the Council should disclose that record unless an exception applies. For example, an email from a personal email account to a Council account would be in the Council's possession. Similarly, if the personal email account is integrated as part of the Council's records, then the record would be in the Council's possession.

III. CONCLUSION

For the reasons above, it is my opinion that the Freedom of Information Act does not require the Council to obtain and produce emails generated on a personal email account and that are not in the possession or control of the Council.

EXHIBIT C



August 9, 2012

BY EMAIL (pmendelson@dccouncil.us) and MAIL

The Honorable Phil Mendelson
Chairman, Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Use of Private Email Accounts to Conduct Government Business

Dear Chairman Mendelson:

On behalf of the D.C. Open Government Coalition ("the OGC"), I am writing to request the Council's reconsideration of its denial of a Freedom of Information Act request by the OGC, and to draw your attention to the underlying policy issue highlighted by the request.

The OGC's FOIA request, submitted on March 19, 2012, seeks all emails within a specified, 60-day period in which Councilmembers conducted government business by means of private, non-governmental email accounts. The request expressly excludes emails *not* pertaining to Council business, such as any emails of a "private or personal" nature. In its response, dated March 27, 2012, the Council's FOIA officer advised that the requested emails "are not among the public records of the District of Columbia." In support, she attached a redacted memorandum – evidently prepared in response to an earlier inquiry – in which the Council's general counsel, David Zvenyach, opined that emails generated by a Councilmember through use of a non-governmental email account are not within the "possession or control" of the Council, and therefore need not be produced.¹

We believe this position is unsound as a matter of both law and policy. As numerous other jurisdictions have recognized,² it would eviscerate public-records laws if officials could

¹ Copies of the FOIA request and the Council's response are attached for your convenience.

² See, e.g., *Matter of Smith v. N.Y. State Office of the Attorney General*, 3670-08, NYLJ 1202555064972, at *1 (N.Y. Sup. Ct. Apr. 30, 2012) ("[T]he OAG has both the responsibility and the obligation to gain access to the private e-mail account of former Attorney General Spitzer to determine whether the documents contained therein should be disclosed to petitioner in accordance with its FOIL request."); *Mollick v. Twp. of Worcester*, 32 A.3d 859, 872, 873 (Pa. Commw. Ct. 2011) ("[A]ny emails that meet the definition of 'record' under the [Pennsylvania open-records statute], even if they are stored on the Supervisors' personal computers or in their personal email accounts, would be records of the Township."); *State ex rel. Glasgow v. Jones*, 894 N.E.2d 686, 691 (Ohio 2008) ("[Representative] Jones concedes that e-mail messages created or received by her in her capacity as state

circumvent their reach simply by doing their work on private email accounts. It also defies common sense to suggest that the Council has no control over, or actual or constructive possession of, records that are literally at the fingertips of its members, retrievable with the kind of modest cooperation that a public body may reasonably expect of its employees when conducting a diligent search for records responsive to a FOIA request. Allowing the denial of the FOIA request to stand would put the Council's stamp of approval on a potentially massive loophole to the District's FOIA.

Second, the OGC respectfully suggests that the Council adopt a clear policy against the use of private email accounts to transact public business. Mayor Gray recently took that step with respect to executive branch employees, as you likely know. In a July 10 executive order, the Mayor said that the practice is "strongly discouraged," permissible only in the "rare instances" where an employee's District-issued email account is unavailable. Even then, employees are instructed to copy or blind-copy their government email accounts in order to preserve a record that will be subject to FOIA and the city's document retention policies. The Mayor's order followed a number of press accounts about the extent of the practice among D.C. government officials, as well as the revelation that the chief of staff to the District's Chief Financial Officer had acknowledged under oath that some of her colleagues discussed government business on private email accounts for the specific purpose of evading FOIA.³ We are aware, of course, that the Council acts through acts and resolutions, not executive orders. But we urge you, as Council Chairman, to take the lead in crafting a similar policy for the legislative branch.

Ultimately, however, this is a situation where a policy change alone is not sufficient. As long as the Council maintains the legal position that non-governmental email accounts are effectively beyond the reach of FOIA, councilmembers and their staffs can disregard any policy on the issue with impunity. We believe this would be contrary to the letter and spirit of the FOIA, as well as the democratic notion that the government's work is the public's business.

For these reasons, we urge the Council both to reconsider its position on the FOIA request and to address the underlying practice through policymaking. The OGC would be

representative . . . constitute records subject to disclosure . . . regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages." The same conclusion has been reached by various state Attorneys General to have considered the matter. See *Personal Use of Electronic Equipment*, AGO File No. 661-08-0388 (Alaska Att'y Gen., Aug. 21, 2008), at 12; *Advisory Legal Opinion AGO 2008-07* (Fla. Att'y Gen. Feb. 26, 2008); *Public Access Op. 11-006* (Ill. Att'y Gen. Nov. 15, 2011); *Public Information Act: Status of Electronic Mail*, 81 Md. Op. Att'y 140 (1996); *Letter Opinion* (Wis. Att'y Gen. Sept. 25, 2006).

³ In a November 2011 deposition, Angell Jacobs, chief of staff to District CFO Natwar Gandhi, testified that members of her office corresponded by private email when "[t]here may have been an issue that we wanted to discuss but did not necessarily want it to be FOIA-able to the press." Tr., Depo. of Angell Jacobs, *Payne v. District of Columbia*, No. 10-cv-00679 (D.D.C.) (Nov. 29, 2011), at 11.

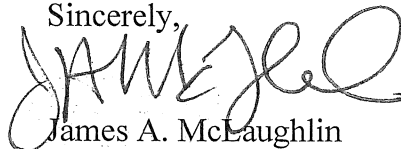
The Honorable Phil Mendelson, Chairman, D.C. Council

August 9, 2012

Page 3

glad to discuss these matters with you or other representatives of the Council, if that would be helpful. Thank you for your attention to this important issue.

Sincerely,



James A. McLaughlin

Chairman, Legal & Enforcement Committee

D.C. Open Government Coalition

cc: V. David Zvenyach
General Counsel, Council of the District of Columbia

Tom Susman
President, D.C. Open Government Coalition

ATTACHMENTS



March 19, 2012

BY E-MAIL (nsmith@dccouncil.us) and MAIL

Ms. Nyasha Smith
FOIA Officer and Secretary to the Council
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, N.W., Suite 5
Washington, D.C. 20004

Re: **D.C. Freedom of Information Act Request**

Dear Ms. Smith:

The D.C. Open Government Coalition ("OGC") hereby submits a request under the Freedom of Information Act, D.C. Code Ann. §§ 2-531 et seq., to inspect and/or obtain copies of the following records:

Any and all e-mails sent or received within the past sixty (60) days by current Councilmembers using private (non-governmental) e-mail accounts, but only to the extent that such e-mails were generated in the course of the Councilmember's official duties – i.e., were received or sent by the Councilmember in his or her role as a public official.

This request therefore does not include e-mails sent or received on private accounts that are personal or private in nature. It merely seeks copies of emails that amount to transacting public business by means of private email accounts within the past 60 days. The request pertains to each Councilmember.¹

OGC is a non-profit organization dedicated to enhancing government transparency and freedom of information in the District of Columbia. We are pursuing this request in furtherance of the public's legitimate interest in knowing what was discussed by its elected Council representatives in a plenary session. Accordingly, the request qualifies for a fee waiver or

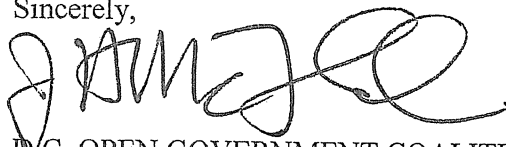
¹ The request is being directed to the Council rather than each individual member based on our understanding that Council itself (rather than an individual member or members) is the appropriate public body to receive a FOIA request, even if the responsive records pertain to particular members.

reduction pursuant to D.C. Code Ann. § 2-532(b). If such a fee waiver or reduction is not granted, however, OGC requests that it be notified if the expected fees exceed \$100.

Please direct any communications or correspondence regarding this FOIA request to me by email at jamesAmclaughlin@gmail.com (preferred) or by mail to my attention at 1602-C Belmont Street, NW, Washington, DC 20009. OGC requests that any responsive records be produced in electronic rather than paper form, if possible. I am available to discuss the request during business hours at (202) 334-7988.

Please do not hesitate to contact me with any questions. Thank you for your time and attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'JAMC', followed by a large, stylized circular flourish.

D.C. OPEN GOVERNMENT COALITION

By: James A. McLaughlin
Chair, Legal & Enforcement Committee

cc: David Zvenyach, Esq. (by email)



**COUNCIL OF THE DISTRICT OF COLUMBIA
THE WILSON BUILDING**

Office of the Secretary

(202) 724-8080

(202) 347-3070 (Fax)

March 27, 2012

Mr. James A. McLaughlin

DC Open Government Coalition

Via email to jamesamclaughlin@gmail.com

Dear Mr. McLaughlin:

This letter is in response to your Freedom of Information Act request to the Council of the District of Columbia for the following documents:

"Any and all e-mails sent or received within the past sixty (60) days by current Councilmembers using private (non-governmental) e-mail accounts, but only to the extent that such e-mails were generated in the course of the Councilmember's official duties – i.e., were received or sent by the Councilmember in his or her role as a public official."

The requested records are not among the public records of the Council of the District of Columbia.

If you are dissatisfied with the determinations set forth in this letter, you may file a civil action in the Superior Court of the District of Columbia pursuant to D.C. Official Code § 2-537(a-1).

For your convenience, these records have been attached to the email response. Please don't hesitate to contact me at 202.724.8080 or nsmith@dccouncil.us if you have any questions or concerns about this matter.

Sincerely,

/s/ Nyasha Smith

Nyasha Smith

Secretary to the Council

OFFICE OF THE GENERAL COUNSEL
COUNCIL OF THE DISTRICT OF COLUMBIA

1350 Pennsylvania Avenue NW, Suite 4, Washington, DC 20004 • (202) 724-8026

MEMORANDUM

To: Nyasha Smith, Secretary
From: V. David Zvenyach, General Counsel
Date: January 3, 2012
Re: Freedom of Information Act and Councilmembers'
Personal Email Accounts

You requested an opinion about whether the Freedom of Information Act requires the Council to obtain and produce emails that generated on a personal email account and that are not in the possession or control of the Council. It is my opinion that the Act does not impose such a requirement.

I. BACKGROUND

On November 30, 2011, [REDACTED] counsel for [REDACTED] requested a formal legal opinion with respect to the use of personal email accounts by Councilmembers.¹ In particular, [REDACTED] noted that Councilmember [REDACTED] copied his personal "Hotmail" email account, but that the Council did not search that Hotmail account. [REDACTED] believes that the emails in the Hotmail account are "covered under the FOIA," but you have advised me that the Council does not possess the emails in the Hotmail account and that Councilmember [REDACTED] Hotmail account is not owned, managed, or accessible to the Council.

II. ANALYSIS

The District's Freedom of Information Act ("FOIA") entitles any person to inspect or copy "any public record of a public body."²

¹ The threshold question from [REDACTED] is whether the Council has a "policy on use of personal email accounts vis-à-vis government business." As a general matter, this is not a question of FOIA, but one of record-retention policies. The Council does not have such a policy, though it should consider adopting one in order to address this and related issues.

² D.C. Official Code § 2-532(a).

As a public body,³ the Council is required to allow for inspection or duplication of the Council's public records. For purposes of FOIA, "public record" is defined to include:

[A]ll books, papers, maps, photographs, cards, tapes, recordings, vote data (including ballot-definition material, raw data, and ballot images), or other documentary materials, regardless of physical form or characteristics prepared, owned, used in the possession of, or retained by a public body. Public records include information stored in an electronic format.⁴

As a threshold matter, I presume that the records requested makes them "public records" within the meaning of the District's FOIA.⁵ Even so, if the Council did not possess or control the public records at the time of the request, the Council is not required to produce them under FOIA.⁶

³ D.C. Official Code § 2-502(18A).

⁴ D.C. Official Code § 2-502(18).

⁵ Most jurisprudence involving emails and "public records" pertain to whether emails of a "personal" nature that are conducted on government accounts are considered "public records." *E.g., Media Research Center v. U.S. Dep't of Justice*, --- F. Supp. 2d ---, Nos. 10-2013, 11-0426, slip op. at 6 (Oct. 13, 2011) (holding that emails generated on government email accounts between then-Solicitor General Elena Kagan and the White House in her capacity as a judicial nominee were not "agency records" under FOIA because "Kagan's correspondence was not relied upon by the [Office of the Solicitor General] in carrying out its business, but rather was used for a purely personal objective."). [REDACTED] citation to *Bureau of National Affairs v. U.S. Department of Justice*, 742 F.2d 1484, 1490 (D.C.Cir.1984), bears on this line of cases, but it does not bear on whether public records must be produced if they are not in the possession or control of a public body.

⁶ I have consulted with the Office of the Attorney General, and the Office concurs with this view. *Accord, e.g., Freedom of Information Act Appeal*, No. 2011-58 (August 22, 2011) ("DC FOIA only requires production of records in the possession of an agency.").

Under the federal FOIA, upon which [REDACTED] correctly notes the District's FOIA is patterned, an agency cannot be compelled to produce a document that the agency did not possess at the time the request was made. *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 145 (1989). Specifically, the Supreme Court has held that "possession or control is a prerequisite to FOIA disclosure" and that FOIA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Kissinger v. Reporters Cmte. for Freedom of the Press*, 445 U.S. 136, 152 (1980) (emphasis added).

Similarly, the District's FOIA does not impose an obligation on an agency to create or retain records, nor does it impose an obligation to collect records. Instead, FOIA requires a public body that has possession or control of a public record to search its files for the public record, and disclose it. Here, because the Council does not possess or control the records in question, the Council is under no legal obligation to produce them.

If, however, the Council *does* maintain possession or control of a public record, the Council should disclose that record unless an exception applies. For example, an email from a personal email account to a Council account would be in the Council's possession. Similarly, if the personal email account is integrated as part of the Council's records, then the record would be in the Council's possession.

III. CONCLUSION

For the reasons above, it is my opinion that the Freedom of Information Act does not require the Council to obtain and produce emails generated on a personal email account and that are not in the possession or control of the Council.